U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 2/20/2001

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IN THE MATTER OF:

Janet L. Tisdale
(Widow of Wallace E. Tisdale)
Claimant

Against

Case Nos.: 2000-LHC-0129/1156

General Dynamics Corporation
Employer

OWCP Nos.: 1-130532/1-14691

and

INA/ACE USA
Carrier

****

APPEARANCES:

David N. Neusner, Esq.
For the Claimant

Lucas P. Strunk, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 1, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be

used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer/Carrier ("Respondents"). This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 13	Attorney Embry's letter filing	06/29/00
CX 14	Copies of the divorce decrees regarding Decedent's prior marriages, as well as	06/29/00
CX 15	Medical Records of Dr. Brendan D. Thomson with reference to his treatment of the Decedent between April 14, 1993 and March 29, 1999	06/29/00
	Deposition Notices relating to the taking of the depositions of	
RX 1	Thomas Godar, M.D., and	07/05/00
RX 2	Dominic N. Pasquale, M.D.	
CX 16	Attorney Embry's letter suggesting a briefing schedule	08/07/00
CX 17	Attorney Embry's letter requesting a short extension of time for the parties to file their post-hearing briefs (the request was granted)	10/12/00
RX 3	Attorney Strunk's letter	10/19/00

	filing	
RX 4 10/19/00	July 20, 2000 Deposition Testimony of Dr. Pasquale, as well as	
RX 5 10/19/00	Dr. Pasquale's **Curriculum Vitae**, and the	
RX 6 10/19/00	June 5, 2000 report of Dr. Pasquale	
RX 7 10/19/00	July 21, 2000 Deposition Testimony of Dr. Godar, as well as	
RX 8 10/19/00	Dr. Godar's **Curriculum Vitae**	
RX 9 10/19/00	Dr. Godar's August 5, 1998 Consultation Summary	
CX 18	Claimant's brief	10/18/00
CX 19 10/18/00	Attorney Embry's Fee Petition	
RX 10 10/23/00	Attorney Strunk's letter filing the	
RX 11	Respondents' brief	10/23/00

The record was closed on October 23, 2000, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Decedent and the employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that Decedent suffered an injury in April of 1999 in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of her husband's alleged injury in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on September 1, 1999.

7. The average weekly wage is $600.00.

8. The Employer and its Carrier have paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether Decedent's carcinoma of the pancreas and lung constitutes a work-related injury.

2. If so, whether he died of such injury.

3. Claimant's entitlement to Death Benefits and interest on any past due compensation and funeral benefits.

PROCEDURAL HISTORY

Administrative Law Judge Samuel J. Smith, by **Decision and Order Approving Stipulations, Awarding Benefits and Attorney Fee**, dated December 18, 1995 (CX 4), concluded that Wallace E. Tisdale ("Decedent" herein), had developed pulmonary asbestosis on April 21, 1993 as a result of his exposure to and inhalation of asbestos dust and fibers as a maritime employee at the Employer's shipyard, that such condition rendered Decedent permanently and totally disabled as of November 30, 1993 and that Decedent was entitled to an award of benefits for such disability based upon his average weekly wage of $600.00. (CX 5)

Decedent moved with his wife to Arizona for medical reasons and this record reflects examinations and treatment at a number of medical facilities in Arizona and those records will be briefly summarized herein.

Summary of the Evidence

Decedent's pulmonary problems worsened over the years and his August 13, 1996 chest x-rays were read as showing "mild restrictive disease," a "mild decrease in DsB" with "no change after bronchodilator," Dr. Rinne opining that such findings were "consistent with processes leading to pulmonary parenchymal destruction such as pulmonary fibrosis..." (CX 6, CX 10, CX 11, CX 12)

Decedent was admitted to the Del E. Webb Memorial Hospital on April 12, 1999 for evaluation of his "dyspnea" and "right sided pleuritic chest pain" of several weeks duration, and Dr. John W. Wakely ordered diagnostic tests. Dr. Camilla A. Mican

was called in in consultation and the doctor gave these impressions on April 14, 1999 (CX 8):

1. Right malignant pleural effusion, due to metastatic adenocarcinoma.

2. History of asbestosis.

3. History of left thoracatomy for pleural and lung biopsies.

Dr. Mican discussed with Decedent and his wife "all of the available options including doing nothing, intermittent thoracenteses, a chest tube insertion under local anesthesia ... and thoracoscopy under general anesthesia." Decedent selected the latter procedure and that procedure confirmed the pancreatic carcinoma with metastasis to the liver and lung. (CX 8)

Decedent was then transferred to the Hospice of the Valley for inpatient palliative care on April 26, 1999 (CX 9) and his condition rapidly deteriorated and he passed away on April 29, 1999 and Dr. G. Terpstra has certified as the immediate cause of death "carcinoma of pancreas" and asbestosis" is identified as "other significant conditions contributing to death but not resulting in the underlying cause given in Part 1." (CX 1) Funeral expenses totaled $655.40. (CX 2)

Wallace Earldon Tisdale (Decedent) married Janet Lou Johnson (Claimant) on October 15, 1979 in Phoenix, Arizona and Claimant was living with Decedent at the time of his death. (CX 3) Claimant has not remarried. (TR 16-17) Decedent's prior marriages ended in divorces and the pertinent records are in evidence as CX 14.

Dr. Jerrold L. Abraham, Professor of Pathology, Director of Environmental and Occupational Pathology, State University of New York, Health Science Center at Syracuse, reviewed Decedent's "records and pathology" sent to him by Claimant's attorney and the doctor sent the following letter to Claimant's attorney on April 11, 2000 (CX 7):

"As requested, I have reviewed the records and pathology you sent related to Mr. Tisdale. According to the records, Mr. Tisdale had a clinical diagnosis of pulmonary asbestosis and had evidence of restrictive lung disease on pulmonary functions tests.

"The only pathology available is related to his fine needle aspirate of the liver performed April 12, 1999. This biopsy revealed matastatic adenocarcinoma. This was confirmed to be adenocarcinoma by immunohistochemical stains showing the tumor was positive for cytokeratin, Leu M1 and CEA, and was negative for calretinin. These findings exclude a mesothelioma and establish a diagnosis of adenocarcinoma. The biopsy is not sufficient to allow definitive identification of the primary site, but the clinical records indicate that the pancreas was suspected to be the primary site. Mr. Tisdale had a lung and pleural biopsy in 1993 (Heart Maryvale Samaritan Medical Center, S93-1725). The slides from this procedure are not apparently available for review, but the report clearly documents a pleural plaque typical of an asbestos-related pleural plaque and lung showing interstitial fibrosis and asbestos bodies. This is sufficient for a diagnosis of pulmonary asbestosis.

"Asbestos exposure is, by definition, the cause of pulmonary asbestosis and of asbestos related-pleural plaques. Mr. Tisdale had evidence of asbestosis and of impaired lung function as a result. When a person dies from any disease, their cardiopulmonary function is a critical factor in determining how long they can survive. Any reduction in the lung function, such as that caused by asbestosis, would hasten the time at which one could no longer maintain sufficient oxygenation to survive.

"Thus I can conclude to a reasonable degree of medical certainty that Mr. Tisdale's occupational asbestos exposure was the cause of his pulmonary asbestosis and asbestos-related pleural disease, and that this exposure and disease resulted in his death at an earlier time than it would have been had he not had the asbestosis," according to the doctor.

The Respondents have offered the following medical evidence in support of their position that Decedent's cancer of the pancreas and lungs was not a work-related injury.

Initially there is the August 5, 1998 Consultation Summary of Dr. Thomas J. Godar wherein the doctor, after the usual social and employment history, his review of Decedent's medical records and diagnostic tests, and the physical examination, concluded as follows in his letter to Respondents' counsel (RX 9):

"**IMPRESSIONS:**

1. Bilateral well developed pleural plaques with some pleural thickening and interstitial fibrosis in lower lung fields consistent with early asbestosis resulting in some restriction.

2. Mild COPD associated with patient's past cigarette smoking characterized by reduced small airway flow, distention, delay in gas mixing and a very mild reduction in diffusion capacity.

3. Chronic depression under treatment, compensated.

4. Gastroesophageal reflux disease, symptomatic, treated, controlled.

5. Obesity, exogenous, mild, with restriction of lung volumes.

6. Rule out ASHD with atypical angina pectoris, not likely.

"**COMMENTS AND RECOMMENDATIONS:** Mr. Wallace Tisdale has relatively clear elements in his respiratory impairment and some that are somewhat muddled by very inconsistent medical records, inconsistencies between his medical records and his current history, and evidence of some malingering or at the very least suboptimal effort during examination and testing. I suspect this is one reason that a surveillance was requested to document that his impairment is as significant as he and his treating physicians allege.

I believe the patient has clear evidence for bilateral early asbestosis as well as well developed pleural plaques and I am not put off by the absence of more significant calcification. It is likely that this is the result of the asbestos exposure that occurred while he was employed at The Electric Boat Shipyard and I do not see enough evidence in his subsequent employment records to suggest additional exposures.

However, the patient's cigarette smoking history is very inconsistent from one history to the next. Currently he claims he smoked ½ to ½ pack of cigarettes a day for a mere 3 years yet medical records suggest every (sic) consumption level from 1 pack per week to 1 pack per day for up to 20 years with most records suggesting he probably stopped in approximately 1979.

I estimate that his exposure therefore is between 10 and 15 pack years likely and this probably represents the mild obstructive component present in his disease in conjunction with contributing to his slight reduction in diffusion capacity. I would explain the variations in his pulmonary function tests from one study to another as not evidence of progression of disease and then miraculous revearsal but rather inconsistent efforts when undergoing testing. This was very much demonstrated by the patient throughout his examination of 08/05/98 which frustrated the laboratory technician and led to the independent observation that he was not willing to give maximum effort, the technician not having been coached in any way since I observed the same during my examination of the patient and had anticipated the same would occur during pulmonary function testing. This not withstanding, the patient does have a significant respiratory impairment which is largely due to asbestosis but contributed to by his mild obesity and mild COPD.

Using reasonable medical judgment and the **AMA Guide to the Evaluation of Respiratory Impairment**, 4th edition 1993, I would estimate the patient's impairment to be no more than 25% for both lungs and the whole person with 15% due to asbestosis, 5% due to COPD secondary to cigarette smoking and 5% due to abdominal obesity with a restrictive effect that is visible on pulmonary function testing. I believe that he probably has reached maximum medical improvement from the standpoint of asbestosis and the COPD but that he could improve further with some weight loss. I believe that the fact that his diffusion capacity is only mildly reduced is consistent with his asbestosis being definite but mild. The diffusion impairment is likely contributed to by his previous smoking as well and his obesity would not affect diffusion in any way. Aside from the need for weight loss, the patient has clearly reached maximum medical improvement within the last 2 years and it is likely his impairment is slightly progressing. I see no evidence for cardiac failure as a contributor to his respiratory impairment.

Since he began smoking at a very early age and does have evidence of airway obstruction it seems overwhelmingly likely that his mild COPD long preceded the appearance of his asbestosis resulting from workplace exposures. Therefore when the pre-existing COPD was combined with his subsequent and more significant asbestosis his respiratory impairment was materially and substantially greater than it would have been had he had the

asbestosis alone. The asbestosis does represent the greatest of his impairing abnormalities and I believe this was partly contributed to by his biopsy but largely the consequence of the underlying disorder. A slight reduction in left lung volume is suggestive that the surgical procedure did in fact increase his dyspnea and reduce his function slightly as his history suggests. I would finally conclude that his impairment is not due solely to asbestosis.

The patient is capable of gainful employment in a relatively sedentary work environment free of acids, fumes or volatile agents, where he is not exposed to extremes of temperature and where only mild to modest physical activity is required. He would not be a candidate for frequent heavy lifting, climbing of stairs, or strenuous activity. It is likely his greatest impediment to gainful employment may be his psychiatric status," according to the doctor.

Dr. Godar reiterated his opinions at his July 21, 2000 deposition, the transcript of which is in evidence as RX 7. The doctor's **Curriculum Vitae** is in evidence as RX 8.

Respondents have also offered the one page report, dated June 5, 2000, of Dr. Dominick N. Pasquale, wherein the doctor states in his letter to Respondents' counsel (RX 6):

"The records your office provided to me have been reviewed and I am writing to provide you with my opinion regarding the issues you raised in your letter dated February 2, 2000.

"It is my opinion that the patient had metastatic pancreatic carcinoma. The pathology report and abdominal and chest computerized tomography studies support this conclusion. The pathology report of the pleural fluid dated April 15, 1999 indicates that the neoplastic cells were consistent with adenocarcinoma and, also, consistent with history of probably pancreatic carcinoma. The CAT scan demonstrated a 4 cm. mass in the tail of the pancreas.

"In my opinion, this malignancy was not the result of asbestos exposure. There is no evidence to my knowledge, that links the development of pancreatic cancer to asbestos exposure," according to the doctor.

Dr. Pasquale reiterated his opinions at his July 20, 2000

deposition, the transcript of which is in evidence as RX 4. The doctor's **Curriculum Vitae** is in evidence as RX 5.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of

employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to

determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**,

Noble Drilling Company v. Drake, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Respondents contend that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because

the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the

presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If Respondents submit substantial evidence to negate the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

Judge Samuel J. Smith, my retired and most distinguished colleague, has already concluded that Decedent's pulmonary asbestosis constituted a work-related injury and such finding is binding upon the parties by **Res Judicata** and Collateral Estoppel as Judge Smith's December 18, 1995 Order is now final.

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his asbestosis and carcinoma of the pancreas and lung, resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Respondents have introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the

employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Decedent's maritime exposure to and inhalation of asbestos dust and fibers initially resulted in pulmonary asbestosis on and about April 21, 1993, that he became permanently and totally disabled on November 30, 1993, that such disability continued until his death on April 29, 1999 (CX 1), that Decedent's asbestosis caused a decrease of his lung function as a result thereof and that such "impaired lung function" "hasten(ed) the time at which (he) could no longer maintain sufficient oxygenization to survive." In so concluding, I have given greater weight to the well-reasoned opinion of Dr. Abraham who "conclude(d) to a reasonable degree of medical certainty that Mr. Tisdale's occupational asbestos exposure was the cause of his pulmonary asbestosis and asbestos-related pleural disease, and that this exposure and disease resulted in his death at an earlier time than it would have been had he not had the asbestosis." (CX 7)

Section 9 of the Longshore Act now provides for an award of Death Benefits to certain survivors "if the injury causes death." This provision has been interpreted many times by the Benefits Review Board and by the appellate courts and the Board has issued a number of significant decisions dealing with the causation issue, most notably in **Fineman v. Newport News Shipbuilding and Dry Dock Company**, 27 BRBS 104 (1993) and earlier in **Woodside v. Bethlehem Steel Corp.**, 14 BRBS 601 (1982). In **Woodside**, the Board held:

> ...**if the decedent's chronic obstructive pulmonary disease hastened his death, the death is compensable regardless of how much longer the decedent would have lived absent the lung condition.**

(**Id.** at 603) (Emphasis added)

Respondents concede that Claimant's medical evidence, especially the Death Certificate (CX 1) and the opinions of Dr. Abraham (CX 7), is sufficient to invoke the statutory presumption in Claimant's favor but that the opinions of Dr. Godar and Dr. Pasquale rebut that statutory presumption. As noted above, I agree with Respondents on these points and I will now proceed to weigh all of the record evidence herein.

Respondents submit that Decedent's asbestosis played no part in his death, that his asbestosis had been relatively stable the last few years of his life and that his respiratory problems were actually due to his pancreatic cancer and the metastasis thereof. As to the timing of Decedent's death, neither Dr. Godar nor Dr. Pasquale believed that it could be said with reasonable medical probability that Decedent's death had been hastened by his asbestosis. (RX 7 at 19-21, RX 4 at 19, 31) Each physician opined that predicting when death would occur is difficult but that death does occur when the cancer takes that last vital cell. (RX 7 at 19, RX 4 at 32)

However, I disagree with the Respondents' position for the following reasons. Initially, I note that the Death Certificate (CX 1) clearly identifies "asbestosis" as a condition **contributing** to death. Secondly, Dr. Godar, when pressed by Claimant's counsel as to any "possible" hastening herein, candidly acknowledged that at best the "hastening" in this case was anywhere from seconds to minutes. (RX 7 at 38)

Thus, in my judgment, the **Woodside** standard has been satisfied by Claimant, and I so find and conclude for these additional reasons.

As noted above, the death certificate of Wallace Tisdale contains a certification that asbestosis was a significant condition contributing to his death. (CX 1) As also noted, the Employer stipulated that Decedent's asbestosis arose out of his employment with General Dynamics and for which he had been awarded permanent total disability in 1993. (CX 4)

Dr. Brendan Thomson, Decedent's attending Pulmonologist, noted in 1995 that Decedent was suffering from extensive disability with severe disease and that his prognosis for survival was less than 5 years, a prediction of remarkable accuracy since he died 4 years later. (CX 15)

In April of 1999, Decedent was diagnosed as suffering from cancer of the pancreas and lung, in addition to his severe asbestosis. He was admitted to Del E. Webb Memorial Hospital where his treatment was almost entirely directed to preserving his pulmonary status. The doctors reported he was suffering from severe dyspnea when walking 15 to 20 feet. (CX 8) His oxygen saturation was well below 90 and he was placed on nasal oxygen.

He was transferred to the Hospice where his O2 saturation had fallen to 84 to 86 and he was reported to have marked dyspnea. The Hospice physical examination reported that despite nasal oxygen Decedent was breathless after speaking a full sentence. It was noted that he was short of breath and had been admitted to the hospital because his blood oxygen level had fallen to 80%. The plan of treatment was to try to raise his blood oxygen level, in light of his pulmonary status. In light of his markedly decreased partial pressure of oxygen and hypoxemia, he was placed on oxygen at 3 liters per minute, a regimen later increased to 4 liters per minute. Despite these efforts, he died on April 29, 1999.

Decedent was evaluated by Dr. Thomas Godar at the request of his employer just before the development of his cancer, who found that he had asbestosis and hypoxemia on mild exertion. (RX 7, RX 9)

Dr. Gerald Abraham concluded that the cause of Decedent’s death listed on his official death certificate was correct. Dr. Abraham opined that the reduction in lung function hastened the death, since he could no longer maintain sufficient oxygenation of his blood to survive. (CX 7)

It is not disputed that Decedent had severe asbestosis rendering him totally disabled for the final six years of his life. Dr. Thomson reported in 1995 that his pulmonary status was so compromised that his prognosis was for less than five years of life.

Dr. Godar found him to be hypoxemic on exercise before the development of his cancer. During his stay at Del E. Webb Memorial Hospital and the Hospice, virtually his entire treatment was designed to try to raise his blood oxygen levels, which had been reduced to lethal levels by his pulmonary disease. Despite the use of oxygen of up to 4 liters per minute, he died as a consequence of his combined cancer and

asbestosis. Indeed the attending physician listed both conditions as the cause of death upon his official death certificate.

Under the Longshore Act, a work-related injury is considered to have caused the death if it hastened the death in any way, even if the death is hastened by only a few minutes or even seconds. **Woodside v. Bethlehem Steel Corp.**, 14 BRBS 601 (1982); **Fineman v. Newport News Shipbuilding and Dry Dock Co.**, 27 BRBS 104 (1993).

This holding follows from the maximum that to hasten death is to cause it. **Avignone Freres v. Cardillo**, 117 F.2d 385 (DC Cir. 1940). Indeed it is axiomatic under the Act that if an injury accelerates death, the death is considered to be work-related. **Independent Stevedores v. O'Leary**, 357 F.2d 812 (9th Cir. 1966).

In **Steward v. Pacific Architects**, 7 BRBS 277 (1977), the claimant suffered a work-related heart attack. Some years later he died as a result of pneumonia and the death certificate stated that the heart condition was a contributing condition which hastened his death. This was held to be sufficient to result in causation being found under the Act.

In **Fineman, supra**, the claimant had an 18% whole man impairment from asbestosis starting in 1977. He died in 1989 from a stroke and his asbestosis was listed as a contributing cause of death on his death certificate. The Board held the condition hastened the death and that the widow was entitled to benefits. **See also Shuff v. Cedar Coal Co.**, 967 F.2d 977 (4th Cir. 1992), **cert denied**, 113 S.Ct., 969; **Peabody Coal Co. v. Director, OWCP**, 972 F.2d 178 (7th Cir. 1992); **Lukaswicz v. Director, OWCP**, 888 F.2d 1001 (3d Cir 1989); **Casey v. Georgetown Medical Center**, 31 BRBS 147 (1997).

The Claimant is also assisted by the presumption under Section 20, and this presumption applies to the issue of whether the worker's death was hastened by a work-related injury. **Woodside, supra.**

In **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19 (CRT) (1st Cir. 1997). The First Circuit noted that the employer not only must present evidence that the injury is not work-related in the broader sense but must

specifically rebut the presumption that the condition was not accelerated or aggravated by work exposures.

Similarly, in **America Grain Trimmers v. OWCP and Janich**, 31 BRBS 71 (CRT) (7th Cir. 1999) the Circuit Court of Appeals held that the opinion of the doctor offered by the employer cannot be accepted on its face, the Administrative Law Judge has to dig deeper into the facts supporting the opinion. Thus, in **American Grain Trimmers**, even though the employer's doctor indicated that he did not feel that the heart attack was work-related, the Circuit Court held that the presumption has not been rebutted since that was not based on specific and comprehensive evidence, but speculation. **American Grain Trimmers, supra.**

When this legal framework is applied to Claimant's claim, it is clear that her husband's death was indeed hastened by his asbestosis and that consequently her claim is compensable, and I so find and conclude.

Decedent's death certificate signed by his attending physician, listed his death as being due to asbestosis. These are the actual doctors who attempted to arrest his condition by use of oxygen of up to 4 liters per minute. The medical records report advancing shortness of breath preventing him from even speaking full sentences. Decedent clearly was hypoxemic with reduced partial pressures of oxygen and low blood oxygen levels.

Dr. Abraham explained that the death was caused by the failure of the lungs to oxygenate the blood and this was hastened by his asbestosis. (CX 7)

Respondents have attempted to defeat the claim by suggesting that he also had pancreatic cancer, a condition that contributed to his death, and that the death would have been inevitable even without asbestosis.

Even if both of these allegations were true, they are not a defense to the claim, and I so find and conclude for the following reasons.

The death is compensable if the work-related injury was a contributing factor hastening death, even if the pancreatic cancer was also a contributing cause.

The inevitability of death is not to be disputed, philosophers and theologians would agree on this statement. However, inevitability is not to be confused with the cause of the end of life, and it is that cause that triggers compensability not inevitability.

While it is likely that had Decedent not had asbestosis, his pancreatic cancer would probably have resulted in his death at a later time. It is also true that if he had not had pancreatic cancer, his asbestosis alone would have caused his death. Indeed Dr. Thomson predicted death from the asbestosis alone would occur just about when it did. As noted, his attending physician, Dr. Brendan Thomson, predicted in 1995 that Decedent would not live 5 years based upon the severity of his pulmonary status. (CX 15)

Furthermore, the law does not base compensability upon speculation as to what the future would have held, but instead is based upon an analysis of the actual causes of death, not its inevitability.

In this case, Respondents have offered the testimony of Dr. Dominick Pasquale, who admitted that Decedent was given oxygen because his lungs were having difficulty getting the life sustaining substance into his blood and that this reduced oxygenation was one of the factors contributing to his decline in health. (RX 4 at 28-29)

Dr. Pasquale candidly admitted that it is very possible that Decedent's poor pulmonary status was a contributing factor in the time of death and that the ultimate cause of death, the proximate cause of death was a combination of his cancer and his pulmonary status. Indeed, Dr. Pasquale admitted that had Decedent had good pulmonary function, "I can say he may have lived 2 or 3 days, but not any significant period of time." (RX 4 at 29-30, 34)

Dr. Thomas Godar has opined that Decedent had a 25% loss of lung function resulting in inadequate oxygenation of his blood when he was examined before the cancer manifested itself. (RX 7 at 11, 24)

Dr. Godar also admitted that death can result from low oxygen levels and remarked that morphine given for pain may, in fact, reduce respiratory function and does hasten death. He admitted that asbestosis would aggravate his terminal pulmonary

distress and that that in combination with his morphine would combine to increase his hypoxemia. Finally, he admitted that the Decedent's asbestosis and resulting hypoxemia may have accelerated his death "by at least seconds to minutes." (RX 7 at 27)

It is clear therefore that based upon their own admissions the underlying opinions of the doctors offered by the Employer do not rebut compensability but, in fact, support compensability, and I so find and conclude.

While it is true that both doctors of the Respondents gave an ultimate opinion that the death was not related to asbestosis, but instead was related to the pancreatic cancer, this Administrative Law Judge is charged with a deeper analysis of the fact supporting that opinion and Respondents cannot defeat the claim simply upon the offering of that opinion, especially as both Dr. Abraham and Dr. Godar acknowledge that asbestos-related diseased played a part in Decedent's death. **American Grain Trimmers, supra.**

It is clear therefore that based upon the Respondents' own experts that the asbestosis acted to hasten the death. The truth, of course, is stronger. The medical records document that Decedent was suffering from severe pulmonary insufficiency even in the face of significant oxygen therapy in his last days. The attending physicians felt that his asbestosis not only acted to hasten his death but was so significant as to be certified on the Death Certificate as another "significant conditions contributing to death." (CX 1)

In short, in Decedent's case, there were 2 causes of death, one of them work-related, and the widow is entitled to benefits as she has established that her husband's death was due, in part to his work-related injury, and I so find and conclude for the following reasons.

I have given more weight to the well-reasoned and well-documented opinions of Decedent's treating physicians as they had the opportunity to observe and monitor Decedent's deteriorating pulmonary condition in the last six years of his life. While I am impressed with the professional qualifications of Dr. Godar and Dr. Pasquale, I cannot accept their opinions herein (1) as the evidence leads ineluctably to the conclusion that Decedent's asbestosis hastened his death and (2) as

Respondents' doctors attribute death to Decedent's pancreatic cancer and his cigarette smoking, while acknowledging the existence of his severe asbestos-related disease.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Judge Smith has already concluded that Decedent's permanent and total disability began on November 30, 1993 and Decedent continued to receive such benefits until his death on April 29, 1999. (CX 1, CX 4)

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom.**

Travelers Insurance Co. v. Marshall, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section

6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on April 30, 1999, the date after her husband's death, based upon the Decedent's average weekly wage $600.00, pursuant to Section 9, as I find and conclude that Decedent's death resulted, in part, from his work-related pulmonary asbestosis. While the Death Certificate certifies as the immediate cause of death, carcinoma of the pancreas (CX 1), Dr. Abraham has opined that Decedent's "pulmonary condition would have been a factor in his eventual demise " (CX 1) and Dr. Abraham forthrightly expresses the "opinion that although not the primary cause of his death, the reduced pulmonary reserve therefrom [**i.e.**, asbestos-related pleural and parenchymal lung disease with long-standing respiratory impairment] was probably a significant contributory factor to hastening the death of Decedent on April 29, 1999, and that absent that pre-existing lung impairment, he might well have survived for a longer period of time." (CX 1) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which he had been receiving permanent total disability benefits from November 30, 1993 until his death on April 29, 1999.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978),

aff'd in pertinent part and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant’s entitlement to Death Benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Responsible Employer

The Employer and its Carrier (“Respondents”) are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S.

913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Judge Smith has already concluded that Decedent was exposed to and inhaled asbestos dust and fibers as a maritime employee from 1958 until 1964, that INA/CIGNA (and its successor ACE USA) provided coverage under the Act for the Employer at the time of Decedent’s last exposure to the injurious stimuli (CX 4) and, accordingly, that Respondents are responsible for the benefits awarded herein. Those findings are also binding upon the parties herein by **Res Judicata** and Collateral Estoppel as Judge Smith’s decision is now final.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and its Carrier ("Respondents"). Claimant's attorney filed a fee application on October 18, 2000. (CX 19), concerning services rendered and costs incurred in representing Claimant between September 7, 1999 and October 16, 2000. Attorney David N. Neusner seeks a fee of $9,277.88 (including expenses) based on 37.75 hours of attorney time at $165.00 and $200.00 per hour and 4.75 hours of paralegal time at $64.00 per hour.

In accordance with established practice, I will consider only those services rendered and costs incurred after September 1, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Respondents' lack of comments on the requested fee, I find a legal fee of $9,277.88 (including expenses of $1,413.88) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and its Carrier ("Respondents") shall pay Decedent's widow, Janet L. Tisdale, ("Claimant"), Death Benefits from April 30, 1999, based upon the average weekly wage of $600.00, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

2. Respondents shall reimburse or pay Claimant reasonable funeral expenses of $655.40, pursuant to Section 9(a) of the Act. (CX 2)

3. Interest shall be paid by the respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Respondents.

4. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of $9,277.88 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between September 7, 1999 and October 16, 2000.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl